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Attorneys for Respondent California Department of
Corrections and Rehabilitation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TONY MABRY,

Petitioner,

v.

L.E. SCRIBNER, WARDEN, ET AL.,

Respondent.

08-CV-0965 BEN (LSP)

**RESPONDENT'S NOTICE OF
MOTION AND MOTION TO
DISMISS**

Judge: The Honorable Leo S. Papas

TO TONY MABRY, IN PRO PER:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules
Governing § 2254 cases in the United States District Courts, Respondent moves the Court for an
order dismissing the above-entitled action on the ground that: (1) Petitioner did not exhaust his
state court remedies; (2) Petitioner filed an untimely Petition beyond the one-year statute of
limitations; and (3) the Petition is unsupported by sufficient facts, is vague, conclusory, and

1 unintelligible. This motion is based on the notice and motion; the supporting memorandum of
2 points and authorities and exhibits; and the pleadings, records, and files in this action.

3 Dated: August 15, 2008

4 Respectfully submitted,

5 EDMUND G. BROWN JR.
Attorney General of the State of California

6 DANE R. GILLETTE
Chief Assistant Attorney General

7 JULIE L. GARLAND
Senior Assistant Attorney General

8 JESSICA N. BLONIEN
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11 s/Kathleen R. Frey

12 KATHLEEN R. FREY
13 Deputy Attorney General
14 Attorneys for Respondent

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16 SD2008700716

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Mabry v. Scribner**

No.: **08-CV-0965 BEN (LSP)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 15, 2008, I served the attached **RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

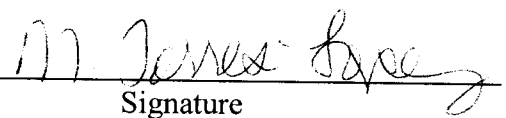
**Tony Mabry
CDC #D-90450
Calipatria State Prison
P.O. Box 5001
Calipatria, CA 92233-5001**

In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 15, 2008, at San Diego, California.

M. Torres-Lopez

Declarant


Signature

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TONY MABRY,

Petitioner,

v.

L.E. SCRIBNER, WARDEN, ET AL.,

Respondent.

08-CV-0965 BEN (LSP)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
NOTICE OF MOTION TO
DISMISS**

Judge: The Honorable Leo S.
Papas

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This is a federal habeas corpus action brought by Petitioner Tony Mabry, a California state
4 prisoner serving an indeterminate term. Petitioner appears to challenge the computation of his
5 minimum eligible parole date on this basis that his amended abstract of judgment was forged.
6 (*See generally* Pet.) This Court should dismiss the Petition because Petitioner failed to exhaust
7 his state court remedies and because the Petition is untimely and is vague, conclusory, and
8 unintelligible.

9 **ARGUMENT**

10 **I. PETITIONER'S HABEAS PETITION SHOULD BE DISMISSED BECAUSE HE**
11 **FAILED TO EXHAUST STATE COURT REMEDIES BEFORE FILING HIS**
FEDERAL HABEAS CORPUS PETITION.

12 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all federal
13 petitions for writs of habeas corpus filed on or after its April 24, 1996 effective date. *Lindh v.*
14 *Murphy*, 521 U.S. 320, 322-323, 326 (1997). Accordingly, AEDPA applies to this petition.

15 Under AEDPA, a petition for a writ of habeas corpus on behalf of a person in custody
16 pursuant to the judgment of a state court cannot be granted unless the prisoner has exhausted the
17 remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A); *see O'Sullivan v. Boerckel*,
18 526 U.S. 838, 844 (1999) (a state inmate must properly exhaust available state court remedies
19 before a federal court may consider granting habeas corpus relief). If one or more claims in the
20 federal petition have not been exhausted, the district court must dismiss the petition. *Pliler v.*
21 *Ford*, 542 U.S. 225, 227 (2004) (citing *Rose v. Lundy*, 455 U.S. 509, 510 (1982)). This rule
22 provides the state courts a full and fair opportunity to resolve federal constitutional claims before
23 they are presented to the federal court, thus "protect[ing] the state courts' role in the enforcement
24 of federal law." *Rose*, 455 U.S. at 518.

25 It is the petitioner's burden to prove he has exhausted his state court remedies before filing
26 his federal habeas petition. *Williams v. Craven*, 460 F.2d 1253, 1254 (9th Cir. 1972) (per
27 curiam). "A petitioner has satisfied the exhaustion requirement if: (1) he has 'fairly presented'
28 his federal claim to the highest state court with jurisdiction to consider it [citations] . . . or (2) he

1 demonstrates that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828, 829 (9th
 2 Cir. 1996). In California, a petitioner exhausts his federal claim by fairly presenting it to the
 3 California Supreme Court. *Kim v. Villalobos*, 799 F.2d 1317, 1318 (9th Cir. 1986); *Larche v.*
 4 *Simons*, 53 F.3d 1068, 1071-72 (9th Cir. 1995). Finally, a petitioner has not exhausted the
 5 available state court remedies “if he has the right under the law of the State to raise, by any
 6 available procedure, the question presented.” 28 U.S.C. § 2254(c).

7 Here, Petitioner does not provide any state court case information and specifically indicates
 8 that he did not seek review in the California courts. (*See* Pet. at p. 6.) There is no evidence that
 9 he presented his claims to the California Supreme Court before seeking federal habeas relief.
 10 (*See* Ex. 1, Decl. of Cynthia Lumley, p. 2) Thus, it appears the claims in his Petition are
 11 unexhausted.

12 Further, Petitioner is not precluded from exhausting his state court remedies because he
 13 could file a habeas corpus petition in the proper California superior court. Because Petitioner has
 14 not “reach[ed] the point where he has no state remedies available to him,” *Peterson v. Lampert*,
 15 319 F.3d 1153, 1156 (9th Cir. 2003), his claims are not properly before this Court and the
 16 petition must be dismissed.

17 **II. THE PETITION IS BARRED BY THE ONE-YEAR STATUTE OF** 18 **LIMITATIONS.**

19 AEDPA provides a one-year statute of limitations in which to file a federal habeas
 20 petition, which begins to run on “the date on which the factual predicate of the claim or claims
 21 presented could have been discovered through the exercise of due diligence.” 28 U.S.C. §
 22 2244(d)(1)(D); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1286 (9th Cir.
 23 1997), *overruled in part on other grounds by Calderon v. United States District Court (Kelly)*,
 24 163 F.3d 530 (9th Cir. 1998) (en banc).

25 Here, Petitioner appears to challenge the computation of his minimum eligible parole
 26 date on the basis that his amended abstract of judgment was forged. Although it is not clear
 27 which amended abstract Petitioner challenges as inaccurate and forged, the most recent amended
 28 Abstract of Judgment was filed on December 15, 1999. (Ex. 2 - Abstract of Judgment, filed

December 15, 1999.) Petitioner was aware, or should have been aware and could have discovered through due diligence, that his sentence in the Abstract of Judgment was changed to be 25 years to life, plus 17 years in state prison. (Ex. 2.) Thus, Petitioner's challenge to his earliest possible parole-date computation based on the amended abstract nine years later is barred by the statute of limitations.

III. THE COURT SHOULD DISMISS THE PETITION BECAUSE PETITIONER'S CLAIMS ARE VAGUE AND UNINTELLIGIBLE.

The allegations raised in the Petition are vague and Petitioner does not sufficiently allege facts to satisfy the federal pleading requirements for writs of habeas corpus established by Rule 2 of the Rules Governing Habeas Corpus Cases. Subsection (c) of Rule 2 requires a petitioner to "state the facts supporting each ground" for relief. Rule 2(c)(2); 28 U.S.C. § 2254. A "petitioner is required to allege facts with sufficient specificity to support his claim for relief." *Wacht v. Cardwell*, 604 F.2d 1245, 1246, 1247 (9th Cir. 1979) ("Notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error). "[M]ere conclusory allegations without the support of facts" are not enough. *Williams v. Field*, 301 F.Supp. 902, 904 (C.D. Cal. 1969); *see also Wacht*, 604 F.2d at 1247 n.2 ("Bald assertions and conclusory allegations" are insufficient). Summary dismissal is appropriate where the allegations in the petition are vague or conclusory. *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

From the Petition, Respondent was able to ascertain that Petitioner is challenging the computation of his minimum eligible parole date on the basis that his amended abstract of judgment was forged. However, Petitioner also asserts several claims which are vague and unintelligible without the provision of supporting facts. For example, Petitioner alleges that his abstracts of judgment are fraudulent, but he does not specifically allege how each document was forged. (*See generally* Pet.) Further, Petitioner claims that Respondent illegally revoked his parole and "paroled" him to another prison, but does not provide facts relating to any parole revocation or prison transfer procedures. (Pet., at p. 9.) Petitioner does not provide a basis for his claim that he is entitled to immediate release from prison and does not specify what his proper parole date should be. These claims are unintelligible and no supporting facts are

1 provided to clarify the claims. Where Petitioner fails to provide facts in support of his
2 contentions, he fails to state a claim and Respondent is unable to provide a response. Therefore,
3 the Petition should be dismissed as vague and conclusory.

4 **CONCLUSION**

5 For the foregoing reasons, Respondent respectfully requests the Court dismiss the Petition
6 with prejudice.

7 Dated: August 15, 2008

8 Respectfully submitted,

9 EDMUND G. BROWN JR.
Attorney General of the State of California

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17 Attorneys for Respondent

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CERTIFICATE OF SERVICE BY U.S. MAIL

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Case No.: **08-CV-0965 BEN (LSP)**

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Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

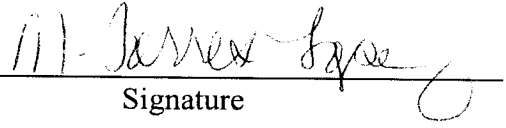
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In Pro Per

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M. Torres-Lopez

Declarant


Signature

SD2008700716

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